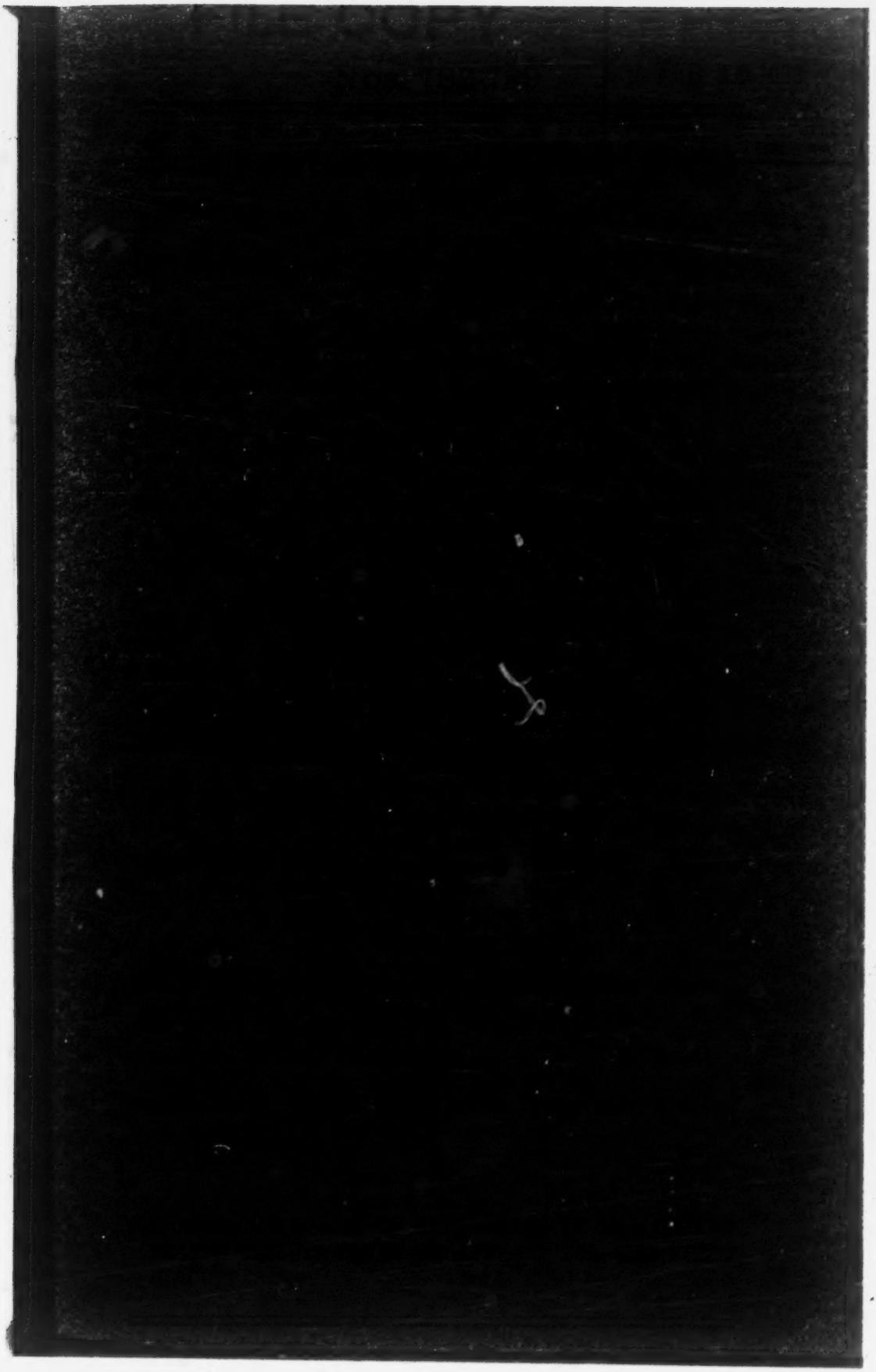
BLANK

PAGE



BLANK

PAGE

INDEX

CITATIONS

44604—38——1

BLANK

PAGE

In the Supreme Court of the United States

OCTOBER TERM, 1937

No. 782

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

SHERMAN KIDWELL

No. 783

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

DEWEY SMITH

No. 784

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

ALLEN COLLINS

No. 785

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

WALTER OWENS

No. 786

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

FRANK PEEL

No. 787

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

BENNIE JONES

No. 788

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

HENRY STONE

No. 789

FRED G. ZERBST, WARDEN, UNITED STATES PENITENTIARY, ATLANTA, GEORGIA, PETITIONER

v.

JEFFIE D. SULLIVAN

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Acting Solicitor General, on behalf of the petitioner, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Fifth Circuit in the above entitled cases entered on November 10, 1937, affirming orders of the District Court for the Northern District of Georgia sustaining writs of habeas corpus and discharging the respondents from custody.

OPINIONS BELOW

The opinion of the District Court in *Kidwell* v. *Zerbst* (R. 20–26) is reported in 19 F. Supp. 475. The order of the District Court in the other cases sustaining the writs of habeas corpus adopted the opinion in the *Kidwell* case. (See for example, *Smith* case, R. 15–16.) One opinion was rendered by the Circuit Court of Appeals covering all of the cases. It is reported in 92 F. (2d) 756.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered November 10, 1937. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether a prisoner sentenced to a Federal penal institution for an offense committed while he was on parole from such an institution may be required by the Parole Board to serve the unexpired por-

tion of his first sentence after the expiration of his second sentence.

STATUTES INVOLVED

The pertinent statutory provisions are contained in the Appendix, *infra,* pp. 16–20.

STATEMENT

All of the above eight cases were argued and submitted together in the Circuit Court of Appeals and were decided by that court in one opinion. Such differences of fact as exist in the cases are, we believe, of no controlling importance. The material facts common to all of the cases were summarized by the Circuit Court of Appeals in its opinion as follows:

> Appellees [respondents], while serving sentences in federal prisons, were released on parole or by reduction of their sentences for good conduct.[1] Before the maximum terms of their sentences had expired they committed federal offenses for which they were convicted and sentenced to imprisonment in the Atlanta penitentiary. The judgments were silent as to the time these second sentences were to begin. In each case, after the prisoner was incarcerated under the second

[1] Prisoners released with credit for good conduct are treated as on parole until the expiration of their maximum term. (See U. S. C., Title 18, Sec. 716 (b), Appendix, *infra*, p. 19.) Such prisoners, as the Circuit Court of Appeals conceded, are consequently as much within the jurisdiction of the Parole Board as those who are granted paroles.

sentence, a member of the Parole Board issued a warrant,[2] directed to any federal officer authorized to serve criminal processes within the United States, reciting that satisfactory evidence had been presented to him that (the person named) had violated the condition of his release, was deemed to be a fugitive from justice, and commanding that the warrant be executed by taking the prisoner, wherever found in the United States, and returning him safely to the institution hereinafter designated.[3] However, the warrant did not designate the institution. The warrants were sent to the warden of the Atlanta penitentiary with a letter instructing him to place the warrant as a detainer and to take the prisoner

---

[2] While it is of no material difference, as no attempt was made to take the prisoners into custody under the warrants, it should be stated that in all of the cases, except the *Collins* and *Peel* cases, the warrants were apparently issued prior to incarceration on the second sentences.

[3] While the warrant in the *Kidwell* case recited that (R. 20). "satisfactory evidence having been presented to the undersigned Member of this Board that said paroled prisoner named in this warrant has violated the conditions of his parole, *the same is hereby revoked* and the said paroled prisoner is declared to be a fugitive from justice" [Italics ours], the provision as to revocation is of no consequence. As is evident from U. S. C., Title 18, Secs. 719, 723a, 723b and 723c (Appendix, *infra*, pp. 18–19), parole may be revoked by the full Board of three members only after the prisoner has been returned to prison under the warrant and after an opportunity for a hearing has been afforded him. The form of warrant used in the *Kidwell* case is an old form. That now utilized by the Parole Board omits any reference to a revocation of parole (See *Owens* case, R. 17).

> named into custody on the warrant at the expiration of his present sentence. The letter further instructed that the case should be listed for a hearing on the violation charge only after (the person named) is in custody on the warrant. The warrants were served and appellees were detained as instructed. Appellees were released on habeas corpus after each had served more time in the penitentiary after his return thereto than the remainder of his first sentence,[4] without deducting any allowance for good conduct or the time he was at large on parole or conditional release before being returned to serve the second sentence.

The court then proceeded to give the facts in the *Sullivan* case as typical.

Pending appeal by the Government to the Circuit Court of Appeals for the Fifth Circuit, each of the respondents was released on bail. (See, for example, *Kidwell* case, R. 28.)

The Circuit Court of Appeals, one judge dissenting, affirmed the orders of the District Court sustaining the release of respondents on habeas corpus.

The majority reached the conclusion that in each case the first and second sentences ran concurrently

---

[4] Thus, in the *Sullivan* case the time remaining on the first sentence at the time of imprisonment on the second sentence was 132 days (R. 7) while in the *Kidwell* case it was 395 days (R. 16) and in the *Collins* case 638 days (R. 9). It should also be noted that the release on habeas corpus in each case was after expiration of the time fixed in the second sentence.

from the day the prisoner was delivered to the Atlanta penitentiary on the second sentence; that the Parole Board was without authority to delay a hearing on the violation charge and to order that the first sentence be served consecutively. The majority decision was based primarily upon the general rule that where a person is confined in an institution under two separate sentences they run concurrently, in the absence of any direction to the contrary, and upon the provision of U. S. C., Title 18, Sec. 723c (Appendix, *infra,* p. 19), that "The unexpired term of imprisonment of any such prisoner [i. e., one for whom the Parole Board or any Member thereof has issued a warrant for his retaking] shall begin to run from the date he is returned to the institution." It held of no consequence the fact that the prisoner was returned to prison under the commitment on the new sentence and not upon the warrant of the Parole Board, the execution of which the Board had delayed until after the expiration of the new sentence, saying that: "The province of the warrants was to secure the return of the prisoners. Since they were already in custody, the issuance of the warrants was vain and useless. The warden held the prisoners under both sentences," citing *Hill* v. *Wampler,* 298 U. S. 460, 465.

The majority also held of no consequence the facts that the Parole Board had not held a hearing as to parole violation after the prisoners had been returned to prison on the new sentences and

that it had not revoked parole. It declared in effect that although the prisoner had not been returned to prison under the warrant but by virtue of the commitment on the new sentence, the Board was required under U. S. C., Title 18, Sec. 719 (Appendix, *infra,* p. 18), to grant the prisoner a hearing on parole violation at its first meeting after the prisoner was returned to custody and that while "thereafter the Parole Board may delay entering the order of revocation in its discretion, the time in which that may be done is limited by the unexpired term of imprisonment. After the prisoner had paid the full penalty of the law it was unnecessary to revoke his parole and the Board was without jurisdiction to do so."

The dissenting judge aptly pointed out:

> *If, as the Court holds, the sentences must be served concurrently there is no real punishment for the new crime.* * * * The Parole Board, within its function of superintending the execution of the old sentences which had been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences. [Italics ours.]

After analysis of U. S. C., Title 18, Sec. 719 (Appendix, *infra,* p. 18), the dissenting judge stated that there was given to the Parole Board "express discretionary authority * * * to postpone the revocation of the parole;" and that

> If the Board thinks a prisoner ought to serve the old sentence in full, as the Parole Act says he shall, after he has finished serving a new sentence, it can by postponing revocation accomplish it. Where the prisoner has been arrested on a parole warrant and committed to the penitentiary on it alone, he is of course serving his old sentence and not to be prejudiced by the Board's delay, but where he is not so committed, but on an independent charge, this does not follow. To prevent any contention that he is now serving the old sentence, the Board directed that arrest under the parole warrant to be postponed. I think this was within the Board's discretion also.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals for the Fifth Circuit erred:

1. In holding that where a prisoner has been returned to a Federal penal institution on a sentence for a new offense committed while on parole from such an institution, the unexpired portion of the original sentence is to be served concurrently with the new sentence, even though the prisoner was not returned to custody under the warrant of the

Parole Board and the Board has not held a hearing and revoked parole.

2. In not holding that where the Parole Board had issued its warrant for the retaking of a paroled prisoner during the period of his original sentence, it could postpone service of the warrant until after the expiration of the new sentence and thereafter hold a hearing on the charge of parole violation, revoke parole, and order service of the unexpired portion of the original sentence.

3. In affirming the judgments of the District Court sustaining the writs of habeas corpus and discharging the respondents from custody.

REASONS FOR GRANTING THE WRIT

1. In holding that a parolee who commits an offense for which he is reimprisoned in a Federal institution serves the unexpired portion of his original sentence coterminously with the new sentence, the majority decision below makes impossible the punishment contemplated by the Parole Law for violation of parole. The Parole Law clearly directs as a punishment for a parole violation that the parole violator be returned to prison and that, if his parole is revoked, he be required to serve the time for which he was originally sentenced without diminution for the period he was on parole (U. S. C., Title 18, Secs. 719, 723c; Appendix, *infra*, pp. 18, 19). Such punishment for violation of parole can be fully accomplished through prompt action by the Parole Board where the violation does not

constitute an offense for which the parolee is reincarcerated. Where, however, a new offense intervenes for which the parolee is reimprisoned, he obviously does not suffer the punishment contemplated by the statute in the event of a revocation of parole where he is permitted to serve any portion of the unexpired balance of his original sentence concurrently with that prescribed by his new sentence.[5] Indeed, if the new sentence is longer than or equal to the remainder of the old sentence, there would be no punishment at all suffered for the parole violation under the majority decision. It is only by postponing the service of its warrant for the retaking of the prisoner and the revocation of parole until after the expiration of the new sentence, as in the instant cases, that the Board may make effective the punishment which the statute contemplates.

The power of the Board to follow such procedure under the statute cannot be questioned where the new offense results in incarceration in a State institution. It is well established in such cases that if the parole warrant is issued during the period of the original sentence the Parole Board may delay a retaking of custody on it and a revocation of parole until the parolee serves his term in the State

[5] It was for this reason that the Board no longer follows the practice which it pursued in *White* v. *Kwiatkowski*, 60 F. (2d) 264 (C. C. A. 10th). There the Board during incarceration of the parolee on a new sentence to a Federal institution revoked parole on the former sentence. It was held that in view of the revocation of parole both sentences were served concurrently.

institution. *Anderson* v. *Corall,* 263 U. S. 193; *Platek* v. *Aderhold,* 73 F. (2d) 173 (C. C. A. 5th) (second sentences for State offenses); *Stockton* v. *Massey,* 34 F. (2d) 96 (C. C. A. 4th), certiorari denied, 281 U. S. 723, (second sentence for Federal offense but to a local jail). See also, *Biddle* v. *Asher,* 295 Fed. 670 (C. C. A. 8th). In such a case obviously the parolee cannot be made to suffer the punishment contemplated by the statute until after his imprisonment in the State institution has terminated.

There is nothing in the Parole Law, we submit, which requires any different treatment of the situation where the parolee is returned to a Federal institution for the new offense. While the parole warrant is required to be issued during the term of the parolee's sentence, the statute does not specifically direct when it shall be served. (U. S. C., Title 18, Sec. 717; Appendix, *infra,* p. 17.) The statute merely says that "At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner the board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before the board of parole, and the board may then, or any time in its discretion, revoke the order [of parole] and terminate such parole or modify the terms and conditions thereof." (U. S. C., Title 18, Sec. 719; Appendix, *infra,* p. 18.) It is obvious that the procedural step which re-

quires the Board to hold a hearing and to determine whether it will revoke parole is a returning of the parolee to prison pursuant to the warrant of the Board. Not until then is the Board required to give any concern to the matter of revocation of parole. Unless the statute is so construed that the Parole Board may postpone the service of its warrant and the revocation of parole until after the parolee has served his second sentence in the Federal institution, there is no way in which the punishment contemplated by the statute may be meted out to the parole violator. As the dissenting judge aptly pointed out:

> The judge can do nothing effectual about it. He cannot terminate the parole or order the arrest of the prisoner as a parole violator, for exclusive power to do all that is expressly vested by Section 3 of the Act of May 13, 1930, [Appendix, *infra*, p. 19] in the Board of Parole and its members. If he should direct the new sentence to take effect on the completion of the old, would he release the prisoner meanwhile? Could the prisoner thus be at large for years if the Board failed to act? Would it be right to leave the prisoner in this state of uncertainty? The judges here making the second sentences did what seemed to them their plain duty and their only function: they fixed a punishment for the new offenses and committed the prisoners for its service. The Parole Board, within its function of superintending the execution of the old sentences which had

> been interrupted by parole, thought parole had probably been violated, and if so the old sentences should be served in full as the parole statute expressly directs. This policy of the statute would not really be carried out by presently terminating the paroles and putting the old sentences into concurrent service with the new. It could only be done by postponing revocation of the paroles, indeed by postponing arrest and return to the penitentiary under the old sentences.

Much is made in the majority opinion of the language of the Parole Act that "The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution." (U. S. C., Title 18, Sec. 723c; Appendix, *infra,* p. 19.) Comparison of this language, however, with the other provisions of the statute shows clearly that the language refers to a return of the parolee to the institution by virtue of the parole warrant—the step in the procedure outlined in the Parole Law which requires the Parole Board to hold a hearing and to determine whether parole should be revoked. In the instant cases the parolees were returned to prison not by reason of any action of the Parole Board, but solely by virtue of the commitments on the new sentences.

Hill v. *Wampler,* 298 U. S. 460, cited in the majority decision, is clearly not in point. This case merely held that sentence is served on the authority of the judgment and the sentence and not the com-

mitment, if there is a variance between them. Reimprisonment of a parole violator was not involved.

For a like reason the cases cited by the majority below which establish that where a person is confined in an institution under two separate sentences, they run concurrently, in the absence of any provision to the contrary, are without application.

2. The question presented is obviously one which is of vital importance in the administration of the Federal Parole Law. It should be settled by a decision of this Court.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for writ of certiorari should be granted.

GOLDEN W. BELL,
Acting Solicitor General.

FEBRUARY 1938.

APPENDIX

Pertinent Statutes

U. S. C., Title 18:

§ 714. Parole of prisoners; conditions. Every prisoner who has been or may hereafter be convicted of any offense against the United States and is confined in execution of the judgment of such conviction in any United States penitentiary or prison, for a definite term or terms of over one year, or for the term of his natural life, whose record of conduct shows that he has observed the rules of such institution, and who, if sentenced for a definite term, has served one-third of the total of such term or terms for which he was sentenced, or, if sentenced for the term of his natural life, has served not less than fifteen years, may be released on parole as hereinafter provided. (June 25, 1910, c. 387, § 1, 36 Stat. 819; Jan. 23, 1913, c. 9, 37 Stat. 650.)

* * * * *

§ 716. Same; application for parole. If it shall appear to said board of parole from a report by the proper officers of such prison or upon application by a prisoner for release on parole, that there is a reasonable probability that such applicant will live and remain at liberty without violating the laws, and if in the opinion of the board such release is not incompatible with the welfare of society, then the board of parole may in its discretion authorize the release of such applicant on parole, and he shall be allowed to

go on parole outside of said prison, and, in the discretion of the board, to return to his home, upon such terms and conditions, including personal reports from such paroled person, as said board of parole shall prescribe, and to remain, while on parole, in the legal custody and under the control of the warden of such prison from which paroled, and until the expiration of the term or terms specified in his sentence, less such good time allowance as is or may hereafter be provided for by law; and the said board shall, in every parole, fix the limits of the residence of the person paroled, which limits may thereafter be changed in the discretion of the board. No release on parole shall become operative until the findings of the board of parole under the terms hereof shall have been approved by the Attorney General of the United States. (June 25, 1910, c. 387, § 3, 36 Stat. 819.)

§ 716a. Same; continuance of parole until expiration of maximum sentence without deductions. Any prisoner sentenced after June 29, 1932, who may be paroled under authority of the parole laws, shall continue on parole until the expiration of the maximum term or terms specified in his sentence without deduction of such allowance for good conduct as is or may hereafter be provided for by law. (June 29, 1932, c. 310, § 3, 47 Stat. 381.)

§ 717. Same; violation of parole; warrant for retaking prisoner. If the warden of the prison or penitentiary from which said prisoner was paroled or the board of parole or any member thereof shall have reliable information that the prisoner has violated his parole, then said warden, at any time within the term or terms of the prisoner's sentence, may issue his warrant to any officer herein-

after authorized to execute the same for the retaking of such prisoner. (June 25, 1910, c. 387, § 4, 36 Stat. 820.)

* * * * *

§ 719. Same; action by board on issue of warrant; revocation of parole. At the next meeting of the board of parole held at such prison after the issuing of a warrant for the retaking of any paroled prisoner the board of parole shall be notified thereof, and if said prisoner shall have been returned to said prison, he shall be given an opportunity to appear before the board of parole, and the board may then, or at any time in its discretion, revoke the order and terminate such parole or modify the terms and conditions thereof. If such order of parole shall be revoked and the parole so terminated, the said prisoner shall serve the remainder of the sentence originally imposed, and the time the prisoner was out on parole shall not be taken into account to diminish the time for which he was sentenced. (June 25, 1910, c. 387, § 6, 36 Stat. 820.)

* * * * *

§ 723a. Same; creation of single Board of Parole; membership; appointment; salary. In lieu of all boards of parole at Federal penal and correctional institutions existing on June 12, 1930, there is created as of that date a single Board of Parole to consist of three members to be appointed by the Attorney General, at a salary of $7,500 each per annum. (May 13, 1930, c. 255, § 1, 46 Stat. 272.)

§ 723b. Same; power, authority, and duties of Board of Parole; prisoners in State reformatories. All power and authority on June 12, 1930, vested in, and all duties on that date imposed upon, the Attorney General and the several boards of parole existing on

that date with respect to the parole of United States prisoners are as of that date transferred to the Board of Parole created by section 723a of this title: *Provided, however,* That this section and sections 723a and 723c of this title shall not affect the method, terms, or conditions under which United States prisoners confined in any State reformatory are paroled, except that the power to approve the release on parole of such prisoners is conferred upon the Board of Parole created by section 723a of this title. (May 13, 1930, c. 255, § 2, 46 Stat. 272.)

§ 723c. Same; violation of parole; warrant for retaking prisoner; effect of violation on unexpired term of imprisonment. The Board of Parole created by section 723a of this title, or any member thereof, shall have the exclusive authority to issue warrants for the retaking of any United States prisoner who has violated his parole. The unexpired term of imprisonment of any such prisoner shall begin to run from the date he is returned to the institution, and the time the prisoner was on parole shall not diminish the time he was originally sentenced to serve. (May 13, 1930, c. 255, § 3, 46 Stat. 272.)

* * * * *

§ 716b. Same; prisoners released with credit for good conduct treated as on parole until expiration of maximum term. Any prisoner who shall have served the term or terms for which he shall after June 29, 1932, be sentenced, less deductions allowed therefrom for good conduct, shall upon release be treated as if released on parole, and shall be subject to all provisions of law relating to the parole of United States prisoners until the expiration of the maximum term or

terms specified in his sentence: *Provided,* That this section shall not operate to prevent delivery of a prisoner to the authorities of any State otherwise entitled to his custody. (June 29, 1932, c. 310, § 4, 47 Stat. 381.)

U. S. GOVERNMENT PRINTING OFFICE: 1938

BLANK

PAGE